

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00178 COA**

**LUMI-TECH, INC., A MISSISSIPPI CORPORATION
AND/OR LUMI-TECH, INC., AN ALABAMA
CORPORATION AND/OR JOHNNY WAYNE DAVIS
AND KEN DEVER**

APPELLANTS

v.

PEOPLES BANK OF THE DELTA

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	12/20/95
TRIAL JUDGE:	HON. EUGENE M. BOGEN
COURT FROM WHICH APPEALED:	SUNFLOWER COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANTS:	GEORGE F. HOLLOWELL, JR.
ATTORNEY FOR APPELLEE:	JOHN HEDGLIN
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT FOR DEFENDANT
DISPOSITION:	AFFIRMED - 1/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

BEFORE McMILLIN, P.J., KING, AND PAYNE, JJ.

McMILLIN, P.J., FOR THE COURT:

This case comes to this Court on appeal from the Circuit Court of Sunflower County. That court granted summary judgment in favor of the defendant, Peoples Bank of the Delta, in a suit filed by Johnny Wayne Davis and Ken Dever. Two corporations, apparently controlled by Davis and Dever, were also named as plaintiffs; however, the corporate plaintiffs did not assert any claim other than that advanced by the individual plaintiffs. The plaintiffs sought the recovery of funds that Davis and Dever had advanced to a business associate when it was discovered that the associate had wrongfully appropriated the funds to his personal use. The associate had deposited the funds into a personal account at the defendant bank and expended them for purposes unrelated to the business. We find no

error in the trial court's determination and therefore, affirm.

I.

Facts

The individual plaintiffs in this case, along with an individual named Lawrence Downs, formed a business enterprise for the purpose of engaging in metal recycling. The parties agreed that the business was to operate in corporate form, but, for various reasons, a certificate of incorporation was not obtained in Mississippi during the times relevant to this suit. The enterprise was originally formed under the name "Spectra-Tech," but was later changed to "Lumitech." Under the agreed plan of operation, Downs was to be the actual operator of the business while the plaintiffs were to be passive investors.

At various intervals extending over a period exceeding one year, the plaintiffs advanced funds to Downs totaling \$149,000. The funds were advanced in nine separate checks, the details of which are summarized in the attached Appendix A to this opinion. Though these funds were intended to be business capital, the checks were deposited by Downs into his personal account at the defendant bank and, according to the complaint, Downs proceeded to expend the funds for purposes unrelated to Lumitech.

The plaintiffs, upon discovering Downs's misappropriations, instituted suit against the defendant bank, claiming entitlement to recovery of the funds on the theory that the defendant bank "had the duty to act commercially reasonable and in good faith when dealing with customers' and other persons' money and business." They further alleged that the defendant bank "breached this duty when it allowed 'Downs', its customer, to endorse the checks . . . without authority."

The trial court granted summary judgment in favor of the defendant bank on these undisputed facts and this appeal ensued.

II.

Discussion

Our review of a summary judgment is *de novo*. ***Merrimack Mut. Fire Ins. Co. v. McDill*, 674 So. 2d 4, 7 (Miss. 1996)**. Only if we are satisfied, based upon our independent review of the same matters considered by the trial court, that there were no contested issues of material fact and the prevailing party was entitled to judgment as a matter of law should we affirm. ***Id.* at 8**. We conclude that, in this case, there is no dispute over the material facts critical to a determination of the proper outcome of the dispute. Thus, we are left to face the question of whether the trial court properly applied the law to reach the conclusion that it did.

The plaintiffs, both in their complaint and in the summary judgment proceedings, asserted that the defendant bank was on notice that the funds were being delivered to Downs for the limited purpose of furthering their mutual business endeavors. The only evidence advanced by the plaintiffs to establish such notice was (a) the manner in which the various checks were made payable, and (b) a notation on one of the cashier's checks that the remitter was "Kenneth Deaver re Spectra Tech." The trial court rejected the idea that there was anything on the face of the checks that would create a

contested issue of fact as to whether the defendant bank had actual notice of (a) the existence of a multiple-investor enterprise, (b) that the plaintiffs had an ownership interest in such a business, or (c) that any restrictions existed on the use of the funds delivered to Downs. That conclusion appears correct to this Court. None of the checks, on their face, do anything to put the defendant bank on notice of such matters. A check made payable to an individual "d/b/a" (which we understand to mean "doing business as") a business trade name is, in actuality, more indicative of the existence of a sole proprietorship than either a partnership or a corporation. A remittance payable in this form could as easily constitute payment of a trade debt or other obligation owed to a sole proprietorship as it could be said to represent restricted funds sent by one member of a multi-member enterprise to another for business-related purposes. We therefore conclude, as a matter of law, that the facts relied upon by the plaintiffs are insufficient to create a jury issue as to whether the defendant bank had actual notice of the nature and true ownership of the funds deposited by Downs.

However, even were we to conclude that the defendant bank had actual notice that Downs was associated with others in the operation of Lumitech, it would appear that the defendant bank would be entitled to claim the protection of section 81-5-53 of the Mississippi Code, which provides that:

A bank dealing, whether to its own benefit or otherwise, with, through or under any person, who is or may be a . . . trustee . . . corporate officer . . . or a partnership member or representative, shall not be deemed to have notice of or be obligated to inquire as to any lack of or limitation upon the power of such person by reason in and of itself, either of the fact that such person has executed in his representative capacity and is himself the payee or indorsee of any check, bill, note or other promise or order, or . . . in connection with any transfer, . . . or in connection with any signature or indorsement of such person.

Miss. Code Ann. § 81-5-53 (1996). The supreme court relied upon this statute to find a bank free from liability for misappropriation by a trustee who removed funds from a trust account and deposited them to the trustee's personal account. *Collier v. Trustmark Nat'l Bank*, 678 So. 2d 693, 698 (Miss. 1996). The court said that "we conclude that the bank is protected in its dealings with fiduciaries unless the bank has *actual knowledge* that the fiduciary is improperly exercising or exceeding his authority. Constructive knowledge or notice is insufficient . . ." *Id.* (emphasis supplied).

Had we been presented with the same argument urged at the trial level, we can discern no reason to suggest that our conclusion would be different from that reached by the trial court. In actuality, however, the plaintiffs take a new tack before this Court, alleging that Downs's acts of endorsing the checks for deposit to his personal account, when he knew the funds were being advanced to him for business purposes, was an act of forgery for which the defendant bank is liable in conversion under section 75-3-419 of the Mississippi Code. This code section (which has since been amended) provided, at times relevant to this suit, that "[a]n instrument is converted when . . . it is paid on a forged indorsement." **Miss. Code Ann. § 75-3-419(1)(c) (1972 & Supp. 1997).**

Without delving into the evident problems presented by such a proposition, we comment only that we find this to be a separate and distinct theory of recovery not asserted in the complaint, even under the most liberal reading. In addition to the fact that the plaintiffs did not plead entitlement to relief under this theory, they did not attempt to assert the theory of conversion through forgery during the trial

court's consideration of the defendant bank's summary judgment motion. This Court, therefore, declines to permit the plaintiffs to argue a different theory of recovery on appeal than was advanced at any stage of the trial court proceedings. *Estate of Johnson v. Adkins*, 513 So. 2d 922, 925 (Miss. 1987). We do not consider this a proper use of the appellate process.

Having found no error in the trial court's rulings on the matters properly submitted to it for decision, we have no basis to disturb its resolution of the matter. The grant of summary judgment was proper and we affirm.

**THE JUDGMENT OF THE SUNFLOWER COUNTY CIRCUIT COURT IS AFFIRMED.
COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

**BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING,
PAYNE, AND SOUTHWICK, JJ., CONCUR.**

Addendum A

Lumitech, et al v. Peoples Bank of the Delta

No. 96-CA-00178

<u>Number</u>	<u>Payee</u>	<u>Amount</u>	<u>Endorsement</u>
1.	L.E. Downs d/b/a Spectra-Tech	\$20,000	Lawrence E. Downs
2.	L.E. Downs d/b/a Spectra-Tech	\$ 5,000	Lawrence E. Downs
3.	Larry Downs	\$25,000	Lawrence E. Downs
[this cashier's check (#3) shows the remitter as "Kenneth Deaver RE: Spectra Tech"]			
4.	Lumi Tech (L.E. Downs D/B/A)	\$25,000	Lumi Tech
			Lawrence E. Downs
5.	L.E. Downs	\$40,000	Lawrence E. Downs
	D B A Lumitech		
6.	Lumi Tech	\$ 9,500	Lawrence E. Downs
			D/B/A Lumi Tech
7.	Lumi Tech	\$ 9,500	Lawrence E. Downs
			D/B/A Lumi Tech
8.	Lumi Tech	\$ 6,000	Lawrence E. Downs
			D/B/A Lumi Tech

9.	Larry Downs DBA Lumi Tech	\$ 5,000	Lawrence E. Downs
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